

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,
Petitioners

v.

FARAH MANUFACTURING Co., INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

**MOTION OF FACILITIES MANAGEMENT CORPORATION
FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

Facilities Management Corporation (FMC), pursuant to Rule 42(3), respectfully moves this Court for leave to file a brief in this case as *amicus curiae*. FMC has neither sought nor obtained the consent of the attorneys for either party to the filing of this motion and the attached brief. In support of its motion, FMC states:

1. The question before this Court is whether an employer's refusal to hire an alien lawfully admitted for permanent residence in the United States solely because that person is not a citizen of the United States constitutes employment discrimination on the

basis of national origin in violation of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1).

2. The briefs of both parties and of amicus Mexican American Legal Defense and Educational Fund are broadly addressed to the applicability of Title VII to "alienage discrimination."

3. FMC operates a maintenance and repair station for aircraft on Wake Island under a contract with the United States Air Force. Under this contract, FMC employs nationals of the Republic of the Philippines who have filed charges with the Equal Employment Opportunity Commission (EEOC) complaining that they are paid less than U.S. citizens employed by FMC under the contract.

4. The charges filed by the Filipino employees claim unlawful discrimination under Title VII on the basis of national origin. FMC has filed a statement with the EEOC which asserts, among other points, that Title VII does not apply to FMC's employment of Filipinos on Wake Island. The matter of the applicability of Title VII is now pending before the national office of EEOC.

5. The Filipinos employed by FMC on Wake Island are paid pursuant to an Agreement between the United States and the Republic of the Philippines, which was signed and entered into force on December 28, 1968. TIAS 6598; 19 UST 7560.

6. The legal and policy issues involved in the case of petitioner Espinoza, who has been lawfully admitted for permanent residence in the United States, are fundamentally different from those involved in the claim of the Filipinos employed by

FMC, who travel to Wake Island on documents issued by the Republic of the Philippines.

7. FMC desires to bring this difference to the attention of the Court and to show why, if the Court decides that Title VII applies to alienage discrimination as discussed by the parties and amicus Mexican American Legal Defense and Educational Fund, decision on the status of Philippine nationals employed in the Pacific should be reserved for a future case, if any, when the applicable legal and policy considerations can be adequately presented to the Court.

8. This motion was not earlier filed because FMC awaited the filing of the briefs of the parties in an effort to avoid moving the Court for leave to file an amicus brief that was unnecessary or redundant.

Accordingly, FMC requests leave to file the attached brief.

Respectfully submitted,

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**BRIEF OF FACILITIES MANAGEMENT
CORPORATION, AMICUS CURIAE**

INTEREST OF AMICUS

Amicus Facilities Management Corporation (FMC) operates a maintenance and repair station for aircraft on Wake Island under a contract with the United States Air Force. Its work force, like the work force of other Government contractors in the Pacific area, consists partially of nationals of the Republic of the Philippines and partially of citizens of the United States. The nationals of the Republic of the Philippines are employed pursuant to an Agreement between the United States and the Republic of the Philippines, which was signed and entered into force on December 28, 1968. TIAS 6598; 19 UST 7560. This

Agreement provides that the wages and fringe benefits paid to Filipinos on Wake Island, and elsewhere in the Pacific, shall be geared to those in effect for Filipino employees of the United States Military Forces in the Philippines. Agreement, Article II, Paragraphs 6 & 7.

The United States citizens employed on Wake Island by FMC are paid on the basis of wages and fringe benefits prevailing in the United States, which, of course, are higher than those prevailing in the Philippines. These citizen employees hold jobs for which a security clearance is required by the United States Air Force. Such clearance is not available to the Filipinos employed pursuant to the Agreement, although U.S. citizen employees of Filipino ancestry do receive such clearance and are employed—at U.S. citizen rates—in jobs for which a security clearance is required.

Filipinos employed pursuant to the Agreement have filed charges with the Equal Employment Opportunity Commission (EEOC), alleging that the payment of higher compensation to the U.S. citizen employees constitutes discrimination on the basis of national origin. *Cristino P. Palpalolatoc v. Facilities Management Corporation*, TLA2 1614 through TLA2 1676; TLA2 1807 through TLA2 1881.

FMC filed a statement with the Regional Director of the EEOC office in which the charges were filed, which asserts, among other points, that Title VII does not apply to FMC's employment of Filipinos on Wake Island. The Regional Director referred the matter to the national office for decision as to the applicability of Title VII. No decision has been rendered by the EEOC.

QUESTION PRESENTED

The question presented by the case at bar is whether an employer's refusal to hire an alien lawfully admitted for permanent residence in the United States solely because that person is not a citizen of the United States constitutes employment discrimination on the basis of national origin in violation of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1). The question whether or not Title VII applies to Filipino employees of FMC on Wake Island involves a number of legal and policy issues not subsumed by the question at bar.

STATEMENT OF CASE

Petitioner Cecilia Espinoza is an alien lawfully admitted for permanent residence in the United States, who lives in San Antonio, Texas, and has expressed a desire to become a citizen. She is married to Rudolfo Espinoza, who is an American citizen. Her application for employment at respondent's San Antonio division was rejected on the basis of its long standing policy to hire and employ only United States citizens (Petitioners' Appendix 2a).

Phillipine nationals who work for FMC on Wake Island are not lawfully admitted for permanent residence in the United States. They are not issued an Alien Registration Receipt Card, Form I-151, but travel to and from Wake Island on documents issued pursuant to the laws and regulations of the Republic of the Philippines. Agreement, Article II.

DISCUSSION

If the Court determines that alienage discrimination as it is discussed in the briefs of the parties and of amicus Mexican American Legal Defense and

Educational Fund does not violate Title VII, that decision would dictate a like conclusion for the employment of Filipinos by FMC on Wake Island. It does not follow, however, that a decision that such alienage discrimination does violate the Act would require a conclusion of violation by FMC or by the other Government contractors that employ Filipinos in the Pacific area pursuant to the Agreement.

The purpose of this brief is to bring the very different situation of the Filipinos in the Pacific to the Court's attention. The purpose further is to show why, if the Court decides that alienage discrimination as presented in this case is a violation of Title VII, the Filipino situation should not be subsumed in that decision but should be reserved for a later case, if one arises, in which the applicable legal and policy considerations can be adequately presented.

The Filipinos on Wake Island, unlike petitioner Espinoza, are not in any sense (admitted for permanent residence in the United States. Indeed, for purposes of the Immigration and Nationality Act, these Filipinos are not even in the United States when they are on Wake Island. That Act defines the United States as "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. §1101 (38). A state is defined as including "the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. §1101(36). The "outlying possessions of the United States" are defined as "American Samoa and Swains Island." 8 U.S.C. §1101(29). Wake Island has been held not to be an outlying possession. *United States v. Paquet*, 131

F. Supp. 32 (D.Hawaii 1955), *aff'd*, 236 F.2d 203 (9th Cir.), *cert. denied*, 352 U.S. 926 (1956).

Filipinos who work for Government contractors on Guam differ only in that they are in the United States while they are on Guam. But they too could not be said to have been admitted for permanent residence in any sense of the words; and they too travel on the basis of documents issued by the Republic of the Philippines.

This fundamental difference between Filipinos working for Government contractors in the Pacific and persons like petitioner who have been admitted for permanent residence in the United States has at least two employment implications. First, such Filipinos cannot be considered for jobs which require a security clearance. The Regulations of the Department of Defense on this score are clear:

... To be eligible to be processed for an industrial security clearance a contractor employee who is an immigrant alien must reside and must intend to reside permanently in the United States (including Puerto Rico, Guam and the Virgin Islands). An immigrant alien contractor employee who does not reside and who does not intend to reside permanently in the United States cannot be considered a bona fide candidate for issuance or continuation of a clearance. The processing of a request for clearance of such an immigrant alien causes needless effort and expense to the Department of Defense and to the contractor, serves no useful Government purposes, and will be administratively terminated without prejudice to the individual concerned.

32 C.F.R. §155.12(b)(2). The EEOC Guideline that is in issue in this case expressly recognizes and